92-1681

Supreme Court, U.S.
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No.92-1577

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

RICHARD L. BRITT AND TIMOTHY JACKSON, JR., *ET AL*,
Petitioners/Cross-Respondents,
v.
THE GROCERS SUPPLY COMPANY,
Respondent/Cross-Petitioners.

Petition For Writ Of Certiorari To
The United States Court Of Appeals For The Fifth Circuit

RESPONSE AND OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the National Labor Relations Act preempts ADEA claims if the conduct of which the ADEA plaintiff complains might also, arguably, be considered an unfair labor practice within the meaning of the NLRA.

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

Mae Alice Britt (substituted as a party for Richard L. Britt, deceased), Timothy Jackson, Jr., and 126 additional individuals who opted-in this case pursuant to 29 U.S.C. §216(b) by filing their written consents[1] were the Plaintiffs-Appellants in Case Number 91-2493 in the United States Court of Appeals for the Fifth Circuit. The Grocers Supply Company, Inc. was the Defendant-Appellee in the court of appeals.

Additionally, in the court below, this case was consolidated with Case Number 91-6043, styled *James E. Hamilton, et al Vs. the Grocers Supply Company, Inc.* The Plaintiffs-Appellants in that case are filing a separate Writ of Certiorari and will appropriately identify all of the parties in that suit.

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[1]Because the list of consenting Plaintiffs-Appellants is lengthy, a listing of their names is provided on pages iii and iv.

Ben, Aaron
Ben, Willis
Bertrant, Glendon Felix
Boyd, Carl
Burke Sr., Lenzie
Burley, Sylvester
Campbell, Leslie
Campbell, Major
Chatman, Willie
Clark, Sam
Clayton, L.C.
Clinton, Samuel
Coleman, Richard
Coney, Alvin
Coruthers, Elijah
Craft, Bruce
Craft, Glen H.
Darby, James E.
Davis, Bill
Davis, Jessie C.
Dease, Charles
Deason, Willie
Doggett, Jesse
Douglas, Joe
Drewy, William
Ealey, Walter
Edwards, Donald
Espree, Edward
Finkelstein, Melvyn
Frank, Nelson
Garner, James A.
Garza, Arturo N.
George, Marshall
Gladney, Herbert
Gooden, Elbert L.
Grant, Ernest
Green, Allen
Green, Costell
Greene, Dalfred
Greene, Judge
Greene, Lonnie
Greene, Tom
Greene, Wilfred
Greer, James
Gross, Vernon
Guillory, Larry J.
Gums Jr., Edward
Hailey, Elbert E.
Hall, Turner
Hamilton, Alfred
Hamilton, Alfred
Hargrove, Robert
Harris, Leonard
Harris Jr., Willie
Henry, Joseph
Hernandez, Edward
Hightower, James
Hill, James
Hinton, Carl Edward
Hogan, Gilbert
Holloway Sr., Clarence
Hooks, Raymond
Eugene Hunter
Hunter, Sr., W.L.
Ivory, Clarence
Jackson, Earnest L.
Jackson, Emmerson
Jackson, James
Jackson, Leland
Jackson, Levearl

Jackson, Lorenzo
Jackson, Richard
Jacobs, Talton
Johnson, Wheeler
Jones, Craig
Jones, Floyd
Jones, Marvin
Jones, Roy
King, Cardis L.
Ladet, Hillary
Landry, Curtis
Lane Jr., A.G.
Latin, Robert
Lee, George
Mack, Jerry
Martin, Felix
McAfee Jr., Aubrey
Meekins Sr., Dan
Menifee, Clay
Minor, Jerome D.
Mosley, Robert
Neal, Harold E.
Patterson, Alvin
Patterson, George
Payton, Freelon
Pittman, Bobby
Readus, Willie
Richardson, Curtis
Rideout, Edward
Roach, Jerry
Robins, R.L.
Rogers, Rollie
Royer, Milton
Rusher, Harvey
Rusher, Harvey
Sanders, Robert
Scott, James
Scott, Murray
Scott, Wilson
Searcy, Archie
Seastrunk, Gary Don
Simmons, James
Smith, Leroy
Spencer, Manfred
Thomas, James
Tolivar, Lloyd
Veazie, Kirby
Washington, Howard
Webster, Robert
Wheatfall, K.T.
Whittington, Alfred
Williams, Earnest
Williams Eldrid
Williams, Thomas
Wright, William Barlow
Young, Clarence
Young, Russell

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RICHARD L. BRITT AND TIMOTHY JACKSON, JR., *ET AL*,
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v.

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Petition For Writ Of Certiorari
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RESPONSE AND OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This suit was instituted by Richard L. Britt and Timothy Jackson, Jr., individually, and, pursuant to the Fair Labor Standards Act, 29 U.S.C. §216(b), on behalf of others similarly situated with One Hundred Twenty-Six (126) additional plaintiffs opting in, alleging a claim of age discrimination against Grocers Supply Company. The Plaintiffs alleged that they were permanently replaced from their jobs because of their age and that this occurred in conjunction with the company purging its entire workforce

by "permanently replacing" the older and more senior workers with younger employees during the strike and its aftermath. The case was decided at the trial court level on summary judgment. There, the District Court concluded that the Plaintiffs failed to proffer evidence of the elements of an age claim under the ADEA and, if they had established such a claim, it would be preempted by the NLRA. Summary judgment was granted in favor of the defendant. The Fifth Circuit Court of Appeals affirmed the trial court's granting of summary judgment because, in it's opinion, the Plaintiffs failed to present evidence sufficient to create a fact issue as to "pretext". (That ruling is the subject of Plaintiffs/Cross-Respondent's original petition for writ of certiorari in this matter.) However, before affirming the trial court on the factual disposition of the case, the Fifth Circuit Court of Appeals considered the preemption issue raised by the appeal and reversed the trial court's determination that the NLRA preempts the ADEA. The correctness of that ruling is the subject of Respondent/Cross-Petitioner's Cross Petition for Writ of Certiorari.

REASONS FOR DENYING THE CROSS-PETITION FOR WRIT OF CERTIORARI

A. The Fifth Circuit correctly resolved the question of preemption or conflict between the NLRA and the ADEA under applicable and existing Federal Law.

Cross-Petitioner predicates its entire preemption argument on the mischaracterization of the nature and source of the ADEA claims asserted by the plaintiffs in this case. Cross-Petitioner has stated the "Question Presented for Review" before this court as being "Whether the National Labor Relations Act preempts ADEA claims of economic strikers who seek to enforce reinstatement rights created by

the NLRA." In its argument for granting the writ of certiorari on the question of preemption, the Cross-Petitioner continues the argument that "[t]he employment practices challenged by the strikers are nothing other than alleged violations of rights and duties created by the NLRA... . Thus, the strikers' ADEA claims are necessary predicated upon NLRA rights and duties." (Cross-Petitioners Writ of Certiorari, Page 5).

Contrary to Grocers Supply's argument, the conduct of which the Britt Plaintiffs complained, namely, unlawful age discrimination, does not fall within the prohibition of the NLRA, but clearly within the prohibition of the ADEA. From the inception of this lawsuit, the Britt Plaintiffs have alleged that they were permanently replaced from their jobs because of their age, that the reasons given by the employer for their "permanent replacement" was a sham and pretext, and that the illusion of a full work force with no job availabilities was false and artificial. The right which the Plaintiffs were attempting to protect and enforce was the right to employment free from discrimination or bias because of their age. That right is protected by the ADEA and the fact that the employer may have violated that right in the process of recalling or refusing to recall former striking employees does not change the source or nature of such right. Whether they were considered striking employees attempting to return to work or new job applicants seeking employment is irrelevant. If job opportunities were available, as in fact they were, the Plaintiffs had a right to the benefit of such employment, assuming qualification, which has never been an issue in this case, free from any bias or discrimination because of their age.

Viewing the case in this proper and correct perspective, as the Fifth Circuit did, the Cross-Petitioners' argument that the NLRA preempts the ADEA must fail when applying

existing applicable federal law. The two traditional preemption doctrines in labor law are based on (1) *San Diego Building Trades Council vs. Garmon*, 359 U.S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959) (the *Garmon* doctrine) and (2) *Lodge 76 International Ass'n. of Machinists & Aerospace Workers, v. Wisconsin Employment Relations Comm'n.* 427 U.S. 132, 96 S Ct. 2548, 49 L. Ed. 2d 396 (1976) (the *Machinist* doctrine). Neither the *Garmon* doctrine nor the *Machinist* doctrine are applicable nor can they compel the conclusion that the NLRA preempts ADEA claims involving conduct which is arguably an unfair labor practice.

As the court below pointed out, since the ADEA creates an independent federal remedy, age claims arising out of arguably unfair labor practices would emerge as "collateral issues" and as such would fall within the exception recognized by the Supreme Court in *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100* U.S. 616, 95 S. Ct. 1830, 44 L. Ed. 2d 418 (1975). More importantly, traditional preemption analysis under either *Garman* or *Machinist* is inapplicable when considering the relations between two, possibly conflicting, federal statutes. *United States v. International Brotherhood of Teamsters* 948 F.2d 98 (2d Cir. 1991), *vacated sub nom. Yellow Freight Systems, Inc. v. United States,* ___ U.S.C. ___ 113 S. Ct. 31 ___. L. Ed. 2d ____ (1992); *Hood v. Smith Transfer Corp.* 762 F. Supp. 1274 (W. D. KY. 1991). The cases just cited were correctly relied upon by the court below in holding that the NLRA does not preempt a federal claim arising under the ADEA which provides independent federal remedy.

Further, an abundance of authority exists establishing that Title VII claims of employment discrimination are not preempted by the NLRA even if the conduct complained of is also in violation of federal labor laws. *Groves v. Ring Screw Works, Ferndale Fastener Div.* 111 S. Ct. 498 (1990).

No logical reason can be discerned why a different result would obtain when considering a case involving a claim of discrimination asserted under the ADEA. Grocers Supply's preemption argument would have the incredible result of denying employees the protection of and the remedies afforded by the ADEA if the employees happen to be union members or the terms of their employment were affected by a collective bargaining agreement and the questioned conduct was arguably protected or prohibited by the NLRA.

No important federal question is presented by the Cross Petition for Writ of Certiorari which has not been previously considered and determined by the courts.

B. The Fifth Circuit's determination of the preemption issue is not in conflict with applicable decisions of this Court.

As a reason for granting writ of certiorari on the Fifth Circuit's opinion regarding this issue of preemption, Cross-Petitioners argue that the opinion of that court that the ADEA is the exclusive remedy for age discrimination is in conflict with applicable decisions of the Supreme Court. In support of that argument, Grocers Supply relies upon this court's opinions in the cases of (1) *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647 (1991), (2) *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975), and (3) *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.* 484 U.S. 539 (1988). Contrary to Cross-Petitioner's argument, the Fifth Circuit's opinion in this case does not conflict with the Supreme Court's holding in any of the cases cited.

By relying upon the *Gilmor* case, Cross-Petition fails to recognize the distinction between a *rēmedy* provided by federal statute and a *forum* in which a claimant might pursue

his statutory remedy. *Gilmor* stands for the proposition that an employee may contractually agree to a different *forum*, in that case arbitration, other than a state or federal court of competent jurisdiction in which this ADEA claim might be determined. The wrong for which a redress was being sought still had its origin in the ADEA. Indeed, the *Gilmor* opinion even recognizes the fact that the ADEA claimant might pursue his claim through the EEOC administrative procedure simultaneously with arbitration proceedings. All the arbitration agreement had done was change the *forum* of concurrent jurisdiction with the EEOC from the state or federal courts to the arbitration forum. The opinion of the court below holding that the ADEA provides the *exclusive* remedy for age discrimination does not conflict with this court's opinion in the *Gilmor* case.

Likewise, the Supreme Court's holding in *Emporium Capwell* does not present a conflict with the holding of the Fifth Circuit in this case. Indeed, *Emporium Capwell* is totally consistent with the opinion of the Fifth Circuit in this case because it holds that a plaintiff asserting racial discrimination under the rights guaranteed or created by Title VII *must* pursue those claims in the manner provided for by Congress in that federal statute and cannot seek redress under the NLRA if the same conduct was arguably an unfair labor practice.

Finally, the Cross-Petitioner's reliance upon *Advanced Lightweight* is totally misplaced and the analysis made by Cross-Petitioner under that case is erroneously misleading. *Advanced Lightweight* involved a choice between ERISA and NLRA remedies for delinquent employer contributions to an employee benefit plan *after* the expiration of a collective bargaining agreement. The court held that the NLRA remedy controlled but reached that determination only because it found that the employer had no "duty to continue making

contributions to a fund *after the expiration* of its contractual commitment to do so." 484 U.S. at 553 [Emphasis added]. Clearly, the opinion of the Fifth Circuit in this case is not in conflict with the Supreme Court's opinion in *Advanced Lightweight*.

Further, the analogy Cross-Petitioner attempts to draw between *Advanced Lightweight* and this case is both factually and legally incorrect. Relying on *Advanced Lightweight*, Grocers Supply argues that "[i]f the NLRA were taken out of the picture, then the strikers would have no claim whatsoever to their old jobs, because nothing in the ADEA entitles economic strikers to preferential recall rights." (Cross-Petition for Writ of Certiorari, Page 13.) The Plaintiffs' claims in this case are not based upon any alleged "preferential recall rights"; rather, the substance of Plaintiffs' complaints in this case is, and always has been, that because of age animus on the part of Grocers Supply, they have been denied employment which they sought to obtain by agreeing to return to work to positions for which they were fully qualified and experienced.

The exclusive remedy for age discrimination in such a case arises from the rights created by the ADEA.

CONCLUSION

For these reasons, the Cross-Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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